

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

EXXON MOBIL CORPORATION . C.A. NO. H-10-2386  
VS. . C.A. NO. H-11-1814  
HOUSTON, TEXAS  
AUGUST 15, 2016  
UNITED STATES OF AMERICA . 3:00 P.M. to 4:19 P.M.

TRANSCRIPT of HEARING  
BEFORE THE HONORABLE LEE H. ROSENTHAL  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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## P R O C E E D I N G S

*THE COURT:* Good afternoon. Go ahead and state your appearances, please.

*MR. STEINWAY:* Dan Steinway, Mike McGovern for --

*THE COURT:* Can't hear you. I'm so sorry.

*MR. STEINWAY:* Your Honor, Dan Steinway and Mike McGovern for ExxonMobil, Your Honor.

*THE COURT:* I cannot hear you. We've got to figure out a better way to do this.

*MR. STEINWAY:* I'm right over the phone. Can I try again, Your Honor?

*THE COURT:* Yes, why don't we do that. Thank you.

*MR. STEINWAY:* Dan Steinway, Mike McGovern for ExxonMobil.

*THE COURT:* I hear you loud and clear.

*MR. STEINWAY:* Thank you, Your Honor.

*MR. BUTHOD:* And Ty Buthod for ExxonMobil as well, Judge.

*THE COURT:* Also very clear.

*MR. ROWE:* And, Your Honor, Mike Rowe, Justin Heminger, and Erica Zilioli for the government. And I hope given that I tested this phone this morning that you can hear me now.

*THE COURT:* It is better. It is not great.

*MR. ROWE:* All right. Let me see if I can check --

1           *THE COURT:* But I think we can manage.

2           *MR. ROWE:* Okay.

3           *THE COURT:* All right. So, I understand from your  
4 letter today, at least from the Department's letter, that some  
5 issues have been at least partly resolved and some remain  
6 subject to discussion and some have not really yet been  
7 explored. Is that fair?

8           *MR. ROWE:* This is Mike Rowe at the Justice  
9 Department, yes, ma'am.

10          *MR. STEINWAY:* Dan Steinway from Exxon, Your Honor.  
11 Yes, Your Honor.

12          *THE COURT:* All right. Very good. So why don't we  
13 start with a couple of them. I understand that we still  
14 haven't received the opinion in the *Shell* case from the judge  
15 in the court of claims and that we really don't have a  
16 timetable at this point for knowing when we can expect it.

17          *MR. STEINWAY:* Dan Steinway for Exxon, Your Honor.  
18 That's correct. All we know, Your Honor, is what Judge Braden  
19 had said in open courtroom, that she expected to issue a  
20 decision in August of this year.

21          *THE COURT:* Our understanding from her chambers is  
22 that it will be somewhat beyond what we thought.

23          *MR. STEINWAY:* Okay.

24          *THE COURT:* Okay. So that takes us to -- and even  
25 then it was unclear to the extent to which that would impact

1 our case. I think the question was whether the judge would  
2 then continue to keep the stay, but other than that, it has  
3 only an attenuated impact on our case. So we need to just  
4 continue on the road that we have begun.

5 I want to focus, because I gather that these are  
6 the focus of your continued discussions -- of course, we'll do  
7 the 30-day extension. That's not an issue. So let's take up  
8 the other two categories that were identified as areas that  
9 warrants discussion. The first is the issue surrounding  
10 insurance proceeds by Exxon, the extent to which those were  
11 recovered in the past. I gather we need to go over that area.

12 Second is the extent to which the new expert  
13 reports -- and I need to first know how many of those there  
14 are -- the extent to which those new reports cover Phase I  
15 issues under cover, if you will, as they're being part of the  
16 Phase II issues.

17 And I'm having a hard time understanding what the  
18 offending overlap is, because the Phase I issues dealt with  
19 liability for proportional shares.

20 *(Judge speaking to law clerk.)*

21 *THE COURT:* And the Phase II issues, of course, deal  
22 with the -- much more with the costs amounts. But in order to  
23 know the costs of what -- that is, in what category the costs  
24 are directed, you have to at least cover some allocation  
25 issues; and if they haven't yet been resolved, then we need to

1 address them here to the extent necessary to identify the  
2 amounts and the purpose for which they were incurred.

3               So I guess I'm trying to understand how we avoid  
4 any overlap and therefore what is offending about the overlap  
5 here.

6               *MR. ROWE:* Your Honor, it's Michael Rowe. Would you  
7 like me to -- did you want to start with that issue and --

8               *THE COURT:* Well, I don't care. Which is the more  
9 vexing of the two and are there others that I have not  
10 included?

11              *MR. ROWE:* Well, there's good news, if you would like  
12 to start with that.

13              *THE COURT:* Oh, you've settled the entire ball of wax?

14              *MR. ROWE:* Not --

15              *THE COURT:* Short call.

16              *MR. ROWE:* Not quite that good.

17              *THE COURT:* All right. Ah, be still my heart. Go  
18 ahead.

19              *MR. ROWE:* Let's do a couple of housekeeping good news  
20 things where we did agree, because we did try to agree as much  
21 as we could -- or can. The first thing is very simple, but the  
22 Court may want to be aware of it. When Your Honor at our May  
23 conference extended all the deadlines 30 days, there was some  
24 question as to whether we should count 30 days or just go from  
25 August 22nd to September 22nd. The parties have just agreed

1 that whatever the date is, if it's the 22nd of one month, it  
2 will be the 22nd of the next month, unless it falls on a Sunday  
3 or something. So that makes it easy for us to deal with our  
4 30-day extensions as we go through the schedule.

5 *THE COURT:* All right. Will you draft an extension --  
6 and extended -- an amended extended 30-day order --

7 *MR. ROWE:* I believe --

8 *THE COURT:* -- an amended scheduling order with the  
9 30-day extension as you have just described it?

10 *MR. ROWE:* Yes, ma'am. I believe that my colleagues  
11 on the other side, we talked about it last week, and I believe  
12 they already have that in progress. But we can certainly do  
13 it. One of us can certainly do it.

14 *THE COURT:* All right. And if you can file that by a  
15 week from this coming Friday, that would be helpful.

16 *MR. ROWE:* That would be -- we would have to have huge  
17 arguments over it for it to take that long, I think.

18 *THE COURT:* Well, that's right.

19 *MR. ROWE:* Okay. The second, it's not so much an  
20 agreement as it's an issue I think we have all but effectively  
21 resolved and it's not at all unimportant in terms of our  
22 ability to move the case along, and that's Item 1 in my letter,  
23 which is, as you know, we talked in May about the collateral  
24 source issues, other sources of income that might have offset  
25 the cost that Exxon is using in the case. One of those was

1 from government contracts. The other is from insurance. The  
2 insurance one, you're correct, we still need to talk about, but  
3 it's very much appearing both from Exxon's interrogatory  
4 answers -- and they had pressed us to look for ourselves, and  
5 we have been looking for ourselves as well. It looks very much  
6 like they sell us fuel and other things as commodities, and  
7 that means there's no opportunity to load costs in cost pools  
8 and that sort of thing. And so there, in effect, is no  
9 collateral source from government contracts as far as we can  
10 tell at this point. We expect to have that wrapped up on our  
11 side shortly. That is no small thing in terms of the  
12 complication of the case. So I suppose it's just good luck for  
13 all of us in some ways, but it's quite significant.

14 *THE COURT:* Okay.

15 *MR. ROWE:* The second issue you may remember we talked  
16 about last time was this NCP issue and the discovery that the  
17 government had sent to Exxon about the NCP. Your Honor  
18 resolved that essentially the last time by allowing Exxon to  
19 wait when it served its expert report. And we have a nice  
20 lengthy, meaty expert report from Exxon's NCP expert now that  
21 lays out in some detail the answers to the questions that we  
22 were posing.

23 So, our only bit of business today about that is  
24 to make sure that Exxon isn't, in effect, admitting that that  
25 report is the answer to the questions that we were posing. So



1 as long -- I don't want to put them through having to answer  
2 all these discovery questions that they've effectively  
3 answered, but I do want to make sure we can rely on that expert  
4 report.

5 *MR. STEINWAY:* Your Honor, it's Dan Steinway for  
6 Exxon. Yes, the expert report, Mr. Johnson's report does opine  
7 on the questions of NCP and it's supported by some of the other  
8 experts before Exxon. That is our response to the government's  
9 interrogatories with respect to the NCP criteria and questions.

10 *MR. ROWE:* Very good. Mike Rowe, Your Honor.  
11 Continuing then -- yes? Sorry. Oh, okay.

12 *THE COURT:* I'm here. I'm waiting.

13 *MR. ROWE:* You asked a moment ago about which issue  
14 was more vexing, and I don't know that one is more vexing than  
15 the other. But since we're already talking now about  
16 collateral source issues, I think it might make sense for us to  
17 move on to the one that -- the older one from back in May,  
18 which was about the insurance proceeds. And rather than -- and  
19 I will tell you that we have received a number of things from  
20 Exxon within the past week or two and some a little earlier,  
21 response -- things we've discussed back in May, but I think at  
22 this point what I would like to do is rather than argue over  
23 the individual discovery items --

24 *THE COURT:* Sir, you're fading in and out and  
25 you're -- the volume is going way up and then way down. It's

1 making it very hard to understand.

2 *MR. ROWE:* Okay. Is this any better, Judge?

3 *THE COURT:* Yes.

4 *MR. ROWE:* Okay. I think we may have to use a  
5 different kind of phone next time. We tested this one this  
6 morning and it seemed to work fine. But it's not a game day  
7 player apparently.

8 So I was just saying, I thought we might proceed  
9 with the insurance proceeds issue, and I wanted to try to take  
10 a more practical tack than going question by question and  
11 interrogatory by interrogatory and talking about coverage  
12 charts and that sort of thing --

13 *THE COURT:* I'm still finding it hard to hear you. I  
14 don't know what we can do about this, but it is very, very  
15 difficult.

16 *MR. ROWE:* Well, Your Honor, what I can do about it,  
17 if you don't mind taking a moment, is I can leave my colleagues  
18 here and I can go call in from my office where I have a headset  
19 that will probably make it much easier to hear, if you would --

20 *THE COURT:* I think that is much better, and, frankly,  
21 this way is just not working.

22 *MR. ROWE:* Okay. I will do that. Just bear with me  
23 while I go call in.

24 *MR. STEINWAY:* Just so we know, Your Honor -- it's Dan  
25 Steinway -- can you hear us okay?

1           *THE COURT:* Yes, I hear you fine.

2           *MR. STEINWAY:* Thank you, Your Honor.

3           *MR. ROWE:* Hello.

4           *THE COURT:* Yes.

5           *MR. ROWE:* Oh, Your Honor, I'm sorry. It's Mike Rowe.  
6 I didn't know I was going to get connected quite that quickly.

7           *THE COURT:* It worked a whole lot better.

8           *MR. ROWE:* Okay. And you can hear me all right now?

9           *THE COURT:* Much better.

10          *MR. ROWE:* Okay. So I think we were through our  
11 immediate good news and we were on to insurance proceeds.

12          *THE COURT:* Right.

13          *MR. ROWE:* And I was going to try to say that rather  
14 than go interrogatory by interrogatory or quibble over coverage  
15 charts or things, that I was going to try to go at this from a  
16 little more practical angle. You may remember that we talked  
17 the last time about the collateral source rule and it not being  
18 applicable to -- at least the government's position, it's not  
19 applicable to allocation --

20          *THE COURT:* You're still going in and out. I don't  
21 know what the problem is.

22          *MR. ROWE:* I don't either. Let me try closing my door  
23 and going hands-free. Let's see if that helps. Usually that's  
24 worse, but we'll try it.

25          *THE COURT:* It may be our end. I just don't know.

1 And if it is, I apologize.

2 *MR. ROWE:* No, not at all. Is this any better now?

3 *THE COURT:* I don't know yet. Let's keep going.

4 *MR. ROWE:* Oh, we have to see if it fades. Okay.

5 So what I wanted to talk about was the insurance  
6 proceeds problem in general and the fact that the government's  
7 position at least is that the collateral source rule doesn't  
8 apply to an allocation case between PRPs and a CERCLA  
9 contribution action. And that means that whatever the  
10 insurance proceeds are need to be accounted for in the case.

11 We know that Exxon combined a whole bunch of  
12 insurance claims, including those for these two refineries,  
13 asked for, I believe it was, 1.2 billion. We know that they  
14 collected 267 million. We know that their demand for Baytown  
15 was about 36.8 million and 51.1 for Baton Rouge.

16 We do not know anything about the ensuing ten  
17 years of what went on, what claims if they were to succeed as  
18 they went through discovery and their negotiations. And so  
19 we're left with only a couple of options at this point, and  
20 that's why we're going at this discovery as much as we are.  
21 So, we -- I think I told you last time that there are cases out  
22 there that suggest that it is Exxon's burden and that if they  
23 can't -- they didn't make an allocation at the time of  
24 discovery, then the whole 267 million would be applicable to  
25 this case. And I also told you that some courts haven't done

1 that, not surprisingly.

2           We expect Exxon to argue that you should just  
3 take a pro rata across-the-board reduction from their original  
4 claim down to the 200 million and then take some more pieces  
5 off of that for other refineries that are not involved in the  
6 case, which would essentially negate the value of insurance  
7 that the government believes that it paid during World War II.

8           And the only remaining option if the government  
9 does not get any information about what insurance companies  
10 paid for and what they were unwilling to pay for, it's probably  
11 going to be when we get there, that the government is likely to  
12 argue that the demands are the most reliable indication. We  
13 know that Exxon had costs up to those numbers, and we know that  
14 they asked the insurance companies for them. And the sum of  
15 those numbers is way less than the 267 million.

16           Now, I don't know whether the Court is going to  
17 agree with the government about that. The problem is with no  
18 discovery, there's nowhere to go. You know, Exxon has this  
19 information -- oh, and by the way, I'm sorry, I should have --  
20 last time we spoke, I think I made a completely unwarranted  
21 assumption that Your Honor would remember all the details of  
22 the case a year after the decision. So I should remind us that  
23 this is not a case in which the government is seeking money  
24 from Exxon. This is a case which Exxon is seeking  
25 contributions from the government. So all the money that's

1 going to be flowing will be flowing from the government to  
2 Exxon. And the question is how much has the insurance already  
3 covered.

4               So, you know, if that's where we are and Exxon is  
5 unwilling to do the discovery and the Court believes it's  
6 unwarranted, I just want everybody to understand where the  
7 government is left at that point and what we end up having to  
8 argue. And I don't know how you would humor Exxon's argument,  
9 knowing that they have information that they haven't looked for  
10 and they just want to reduce everything by a percentage. So, I  
11 think it's worth discussing, and we would like to find some  
12 practical solution to it, but that's where we are right now.  
13 And I just don't want to be springing that on people, you know,  
14 in February when we're filing a summary judgment motion.

15               *THE COURT:* All right. Let me hear from Exxon.

16               *MR. STEINWAY:* Your Honor, Dan Steinway will kick it  
17 off. Your Honor, in the last status conference, as you know,  
18 per direction of the Court, we have given the government a  
19 substantial amount of insurance coverage information. And the  
20 Court made it clear that there had to be specific items that  
21 the government really needed and requested. We've given the  
22 government so far, Your Honor, coverage charts, as the Court  
23 has directed. We've given the government the NACC data sheets,  
24 and we've confirmed to the government that all of the  
25 depositions in the insurance NACC case that the government

1 wanted, we've given them. So we've given them narrow, tailored  
2 discovery replies per the Court's request.

3 We also, as you may recall, Your Honor, you  
4 asked -- the Court directed us to give the government  
5 information regarding whether or not there were any future  
6 claims or future cost issues still to be resolved.

7 *THE COURT:* Right.

8 *MR. STEINWAY:* We've given the government the  
9 information on this, and we've told the government that indeed  
10 all the insurance cases were settled and that the settlements  
11 included any future claims. So the government has all the  
12 information regarding future issues. We responded, Your Honor,  
13 to the specific requests of the government as to what they have  
14 asked for. And we feel, quite frankly, Your Honor, that the  
15 government's characterization of the law in this area is not  
16 correct. They have referred to one case. We call that the  
17 *Friedland* case, Your Honor, in the Tenth Circuit, which is  
18 clearly the minority opinion. We believe the majority opinion  
19 is the *NCR* case in the Seventh Circuit, which was just handed  
20 down, as well as the standard CERCLA jurisprudence, which says  
21 if there's enough information out there to sit down and try to  
22 do a calculation, then that should be the basis for the  
23 adjudication of these issues. And we certainly feel the  
24 government now has all that information to make those  
25 dispositive calculations.

1           *THE COURT:* All right. Did you want to respond?

2           *MR. ROWE:* Just briefly, Your Honor. It is true that  
3 Exxon has sent us some of the specific things you allowed.  
4 Most of them thus far have not been terribly helpful at trying  
5 to ascertain what the nature of the settlement was. Some of  
6 that's technical glitches. The coverage charts came in  
7 pixelated and we couldn't read them, so we have new ones. But  
8 at the moment it does not appear that they will answer the  
9 question.

10                   What Mr. Steinway referred to as the NACC charts  
11 just a moment ago, the NACC is the North American coverage case  
12 that Exxon brought, so that's the insurance case. The charts  
13 they have given us are helpful, because they demonstrate that a  
14 lot of the same projects that Exxon is asking us to pay for,  
15 they were asking the insurance companies to pay for. I can't  
16 yet tell whether it's a complete overlap, but it appears to be  
17 close. Curiously --

18           *THE COURT:* Did Exxon get insurance money from those  
19 requests?

20           *MR. ROWE:* Well, that's -- I mean, yes, and the  
21 question is how much. So --

22           *THE COURT:* Exxon, how hard would it be to answer that  
23 question, not what did you ask for from both insurance and  
24 Exxon, but what did you get from insurance that you've also  
25 asked Exxon for?



1           *MR. STEINWAY:* Your Honor, Dan Steinway for Exxon. We  
2 have given the government what we've gotten, but unfortunately  
3 a lot of these insurance cases where there's over 200 insurance  
4 policies and 300 -- 3,500 sites at issue, there is never a  
5 clear allocation of specifics that the government has asked us  
6 to do. That's just not normally what is done in these massive  
7 insurance coverage cases --

8           *THE COURT:* How were they allocated? Number one, how  
9 many cases are there?

10          *MR. STEINWAY:* There were 200 insurance policies --

11          *THE COURT:* That's not my question. How many pieces  
12 of litigation?

13          *MR. STEINWAY:* Just one for the -- just one piece of  
14 litigation, Your Honor. It's called the NACC, as the  
15 government has referred to it, the North American --

16          *THE COURT:* All right. All right. I just wondered if  
17 there were other cases. So it's a number of policies  
18 applicable to different periods and different places, correct?

19          *MR. STEINWAY:* Yes, Your Honor.

20          *MR. BUTHOD:* And different insurers, of course, yes.

21          *THE COURT:* And, I'm sorry, different what?

22          *MR. BUTHOD:* Oh, I apologize, Judge. It's Ty Buthod.  
23 And different insurers of course.

24          *THE COURT:* Of course. Of course. And if they are  
25 not allocated in the same way, that is, the proceeds paid tied

1 to the same kind of categorization that the -- that Exxon is  
2 applying to its cross-recovery request to the government in  
3 this case, how are they tied? How are they allocated,  
4 identified?

5 *MR. STEINWAY:* Your Honor, Dan Steinway again for  
6 Exxon. They are identified and tied just by very generic  
7 categories, by the sites themselves. We don't have the kind of  
8 information that talks about it on the specific, really defined  
9 unit-by-unit approach that the government --

10 *THE COURT:* But let's start with the first thing you  
11 said though. So the first way they're allocated is by site; is  
12 that correct?

13 *MR. STEINWAY:* Generally speaking, we can deduce that  
14 from the type of -- the amounts that are settled for by the  
15 carriers.

16 *THE COURT:* So the first thing you can do to identify  
17 what insurance moneys have already been received is to look at  
18 the ones that involve the same sites as we are dealing with  
19 here, the two sites in question, correct?

20 *MR. MCGOVERN:* Your Honor, this is Mike McGovern for  
21 Exxon. And in terms of the settlement agreements with the  
22 insurers, there's no allocation whatsoever. They basically  
23 paid a certain amount of money. There's --

24 *THE COURT:* Do they do it tied to any particular  
25 geographic site?

1           *MR. MCGOVERN:* No, they did not.

2           *MR. BUTHOD:* No, Judge.

3           *THE COURT:* All right. So all we can do is look at  
4 how many claims were generated for other sites and get that as  
5 some sort of sense of the amounts at issue? Is that where we  
6 are?

7           *MR. MCGOVERN:* That's correct, Your Honor. I mean, to  
8 give you sort of a general sense of what it was like, the total  
9 past expenditures that were claimed in this litigation to the  
10 insurers was, as Mike Rowe said, approximately 1.2 billion. Of  
11 that amount, the Baytown/Baton Rouge components of those  
12 were -- for Baytown, all of 3 percent of the claim costs; for  
13 Baton Rouge, all of 4 percent of the claim costs.

14           Exxon ultimately recovered -- when you eliminate  
15 their litigation fees in doing this litigation, they recovered  
16 16 percent from a pro rata basis, in other words, you know,  
17 1.2 billion. There was no allocation in the settlement  
18 agreements. There's been no allocation since then. And so  
19 that's the quandary we're in. And that's why we thought as --  
20 or the courts do, if it's not simply double discovery, in other  
21 words, what we recovered from the insurers on a pro rata basis  
22 for Baytown and Baton Rouge, coupled with what we could in our  
23 wildest dreams recover from the government in this case is less  
24 than a hundred percent. But even if you were to do a pro rata  
25 of the 3,600 sites in the NACC litigation, the pro rata

1 across-the-board, it's only 16 percent of the costs. And so  
2 that only comes down to -- for Baytown and Baton Rouge in this  
3 case, you know, 3 or 4 million for each site that would be even  
4 conceivably considered recovered from our loss claim of about  
5 80 million in this case.

6 *MR. ROWE:* Your Honor, Mike Rowe. A couple of  
7 clarifications there. First of all, we don't agree with the  
8 pro rata thing, and there's no evidence that that happened.  
9 And I think we can all be certain that whatever the basis for  
10 the final figure was, it was not just 16 percent of the ask for  
11 the whole thing, when it was all calculated up for all these  
12 sites.

13 The second thing is that unfortunately there is a  
14 case out there -- I don't recall the name of it. I read it  
15 back in May -- in which a court had, I think, 16 or 18 sites  
16 and 8 were at issue and it said, Well, I'm just going to take  
17 the 8 sites and prorate that way. The problem is, that in this  
18 case you would be prorating a number of gas stations against  
19 one of the world's largest oil refineries. So, that's really  
20 not going to work here.

21 In terms of the allocation questions you were  
22 asking, I think we have to be a little careful with  
23 allocations. So, I would say to you -- I think what you were  
24 asking was, how do we know if the costs are the same. And what  
25 we know, for example, is Exxon has a number of projects that it

1 conducted on the environmental work, and one of those, for  
2 example, is on an oil/water separator they called 3M. And  
3 there is a cost figure for the separator 3M in the NACC data  
4 that they have given me. So, I know that was a project in the  
5 insurance case and that's a project in this case. And there  
6 are a number of other similar ones.

7           What we don't know is in the course of the  
8 negotiation, how did the insurance companies respond to the  
9 demand, if in this printout it's 34.7 million and Exxon's  
10 answer -- or initial disclosures, they said it was  
11 approximately 36.8 million. But it's in the 35-million-dollar  
12 range somewhere. And I just -- you know, the government -- I  
13 understand that there are going to be differences of opinion  
14 about whether the collateral source rule applies and if it does  
15 apply, whether Mr. McGovern's view prevails, or whether what I  
16 think is the more common place view, which is that the costs  
17 recovered from insurance are simply removed from the sum before  
18 the allocation is done. That's the common version of this.

19           We have to know how much to subtract. And the  
20 courts appear to say, certainly that Tenth Circuit case that  
21 Mr. Steinway doesn't like, says that that's Exxon's -- it's  
22 their burden to show the court some form of allocation. And I  
23 just -- you know, I think they are to some degree at a loss.  
24 The problem for the government is, we're bearing the loss based  
25 on this massive pro -- supposed pro rata reduction, when we

1 paid -- we think we can show the Court that we paid the  
2 premiums for these insurance policies in World War II. We  
3 don't know what they recovered, and that's what we're trying to  
4 find out. Maybe there's nothing to find out, but then we're  
5 going to have to deal with the issue down the road. So that's  
6 really what I wanted to talk about today.

7 *MR. BUTHOD:* And, Judge, if I could, this is Ty Buthod  
8 for Exxon. It's fair to say that fundamentally there are a  
9 number of things counsel just said that we differ about. But  
10 one of them is, frankly, if the government's view prevails,  
11 that absent our specific demonstrated evidence and specific  
12 allocation of insurance proceeds, they take the whole  
13 enchilada, so to speak --

14 *THE COURT:* You mean they pay you nothing?

15 *MR. BUTHOD:* They pay us nothing, because we can --  
16 we'll stipulate that we got \$200 million post deduction for  
17 attorneys' fees from the NACC litigation.

18 *THE COURT:* And that would be the 16 percent?

19 *MR. BUTHOD:* No, that -- yeah, that would be  
20 16 percent of what was originally sought. And if the  
21 government --

22 *THE COURT:* Wait, wait, wait. 16 percent of what you  
23 are seeking in this case; is that correct?

24 *MR. ROWE:* Your Honor, Mike --

25 *MR. BUTHOD:* No.

1           *MR. ROWE:* -- and I think what Mr. Buthod is saying,  
2 is that Exxon's initial insurance demand for all of the claims  
3 was 1.2 billion. Their recovery was 267 million, of which they  
4 had told us approximately 67 million was attorneys' fees, and  
5 that's about 16 percent of the original ask.

6           *MR. BUTHOD:* Correct. And my point --

7           *THE COURT:* How about -- well, wait, wait. How does  
8 the original ask relate to what you are asking in this case  
9 from the government?

10          *MR. BUTHOD:* Well, we can identify our original ask in  
11 the insurance litigation that can be attributed to Baytown and  
12 Baton Rouge.

13          *THE COURT:* I'm not asking that question. I  
14 understand you can't do that.

15          *MR. BUTHOD:* I said we can, what we originally asked.

16          *THE COURT:* All right. And what was that?

17          *MR. BUTHOD:* Those are the percentages that  
18 Mr. McGovern mentioned earlier. Right, Mike?

19          *MR. MCGOVERN:* Sorry?

20          *THE COURT:* Is that a 16 percent or is that an  
21 earlier -- a different one?

22          *MR. MCGOVERN:* Your Honor, this is Mike McGovern. If  
23 you're asking for what was the percentage of the Baytown and  
24 Baton Rouge costs claimed in the NACC litigation as to the  
25 total amount of the NACC claim --

1           *THE COURT:* Yes.

2           *MR. MCGOVERN:* -- Baytown was approximately  
3 34.7 million. Baton Rouge was approximately 47.4 million. So  
4 each of those was -- Baytown was 3 percent of the total NACC  
5 claim. Baton Rouge was approximately 4 percent of the total  
6 NACC claim.

7           *THE COURT:* All right. So you take 7 percent of the  
8 total NACC claims, right?

9           *MR. BUTHOD:* Yes.

10          *THE COURT:* And 7, correct? And that's what's  
11 allocated to these two properties. And then how does what was  
12 paid out in the NACC litigation, the NACC sets of disputes --  
13 you told me that that was 16 percent of what was asked for.

14          *MR. BUTHOD:* Correct.

15          *THE COURT:* So we know that 3 -- that 7 percent of the  
16 16 percent went to the two properties -- the two refineries  
17 here?

18          *UNIDENTIFIED SPEAKER:* That's correct, Your Honor.

19          *MR. BUTHOD:* Yes, Judge.

20          *THE COURT:* And what is that percentage? Somebody do  
21 that arithmetic.

22          *MR. BUTHOD:* I was thinking from the prior notes I  
23 had, about \$6 million --

24          *THE COURT:* Who is speaking?

25          *MR. BUTHOD:* Oh, I'm sorry. This Ty Buthod for



1 ExxonMobil.

2 *THE COURT:* Thank you.

3 *MR. BUTHOD:* I apologize.

4 *THE COURT:* Okay. 7 percent -- what is the answer to  
5 that arithmetic question?

6 *MR. STEINWAY:* Dan Steinway for Exxon, Your Honor.  
7 It's about \$7 million.

8 *THE COURT:* So 7 million out of the 200 million paid  
9 went to Exxon in insurance proceeds for these two properties?

10 *MR. MCGOVERN:* On a pro rata business, that would be  
11 correct, Your Honor. Mike McGovern.

12 *MR. ROWE:* And, Your Honor, this is Mike Rowe. And  
13 that's our -- that is our concern here, is that we have no way  
14 to know that this was done on a pro rata basis, and I'm pretty  
15 sure it --

16 *THE COURT:* Well, wait. What is "this"?

17 *MR. ROWE:* In other words, Exxon asked for  
18 \$1.2 billion for hundreds of gas stations and multiple  
19 refineries and various projects --

20 *THE COURT:* Well, but, look, what we are doing is an  
21 approximation, because there is no other more precise approach  
22 that the records will permit, correct?

23 *MR. STEINWAY:* Dan Steinway for Exxon, Your Honor.  
24 That is correct. And we have no further information to do  
25 anything other than what Your Honor is suggesting right now.

1           *THE COURT:* So even if we were to extend -- to  
2 increase the amount -- that is, to presume that it should be  
3 less because it covers some things that are wholly different  
4 from the remediation at issue, such as gas stations -- so let's  
5 assume for the sake of discussion that we ought to instead of  
6 giving Exxon credit, if you will, for having already received  
7 \$7 million, we should perhaps reduce that by a number  
8 proportional to the disparate kinds of costs covered by the  
9 7 million or included in the 7 million.

10           *MR. STEINWAY:* Dan Steinway for Exxon, Your Honor. We  
11 would agree with that. And we don't have any further  
12 information to suggest one way or the other how to allocate it.  
13 So, what the Court is suggesting makes reasonable sense to us,  
14 Your Honor.

15           *THE COURT:* So if we assumed -- and you tell me based  
16 on your examination of the records if this is accurate. Let's  
17 assume that 10 percent of the properties covered by the NACC  
18 litigation or addressed by it were so different from these  
19 refineries, that they should not be -- that the proceeds should  
20 not be included in the credit or the allocation to Exxon for  
21 the payment of the proceeds. So 10 percent of 7 million is how  
22 much?

23           *MR. BUTHOD:* \$700,000, Judge. This is Ty Buthod.

24           *THE COURT:* Right. So if we were to say deduct  
25 700,000 from 7 million, we would get --

1           *MR. BUTHOD:* 6.3, Judge.

2           *THE COURT:* -- 6.3, right?

3           *MR. STEINWAY:* Yes, Your Honor.

4           *THE COURT:* And what if we then -- I mean, if that's  
5 right, if 10 percent is a reasonable reflection --

6           *MR. STEINWAY:* Your Honor, this is Dan Steinway for  
7 Exxon. 10 percent, I mean -- I don't know the scope of the  
8 3500 sites involved, Your Honor, but I would say that  
9 10 percent attributable to gas stations was probably low. I  
10 don't have a basis for saying that before you, Your Honor,  
11 right now.

12           *THE COURT:* Well, let's be conservative.

13           *MR. STEINWAY:* That would be a very conservative  
14 number.

15           *THE COURT:* All right. That would sort of favor the  
16 government in the sense of being conservative and --

17           *MR. ROWE:* I'm sorry, it's Mike Rowe. I'm getting a  
18 little bit lost in the mathematics here. But I do want to make  
19 clear that I do not think what you're talking about would favor  
20 the government.

21           *THE COURT:* No, I think that's exactly right. On  
22 reflection, you are exactly right.

23           *MR. ROWE:* Yes.

24           *THE COURT:* The more conservative we are, that is, by  
25 understating the number of disparate properties --

1           *MR. ROWE:* Right, Exxon would benefit.

2           *THE COURT:* That's correct. So let's increase it to  
3 15 percent or 20 percent, which would --

4           *MR. ROWE:* Yeah.

5           *THE COURT:* -- help the government. At least we can  
6 see the differences. We're not talking about huge amounts of  
7 money. It would be the difference -- if we went to 20 percent,  
8 we would have 1.4 million to deduct from the 7 million,  
9 correct?

10          *MR. BUTHOD:* Yes.

11          *THE COURT:* So that would be --

12          *MR. BUTHOD:* 5.6 million, Judge.

13          *THE COURT:* Right. And if it was 15 percent?

14          *MR. ROWE:* Your Honor, it's Mike Rowe again. And the  
15 difficulty that we have is that Exxon wants to do this all by  
16 percentages, which leads to an assumption that is okay to just  
17 do a pro rata reduction across-the-board.

18          *THE COURT:* Come up with a better way that  
19 approximates --

20          *MR. ROWE:* Well, we would say -- you know, again,  
21 nobody is asking the Court to decide this today, but --

22          *THE COURT:* No, I understand, but we need to back into  
23 what are the necessary pieces of information to refine this to  
24 the extent we can.

25          *MR. ROWE:* My answer would be that the government

1 would take the position that Exxon has provided no evidence of  
2 allocation that would suggest that they did not collect the  
3 insurance for the refineries that they asked for.

4 *THE COURT:* A hundred percent?

5 *MR. ROWE:* Well, I don't -- the reason I'm asking for  
6 the discovery is to try to find some evidence to do something  
7 else.

8 *THE COURT:* Well, what other evidence is there that  
9 Exxon has to produce that you haven't already received? That's  
10 what I'm struggling to understand.

11 *MR. ROWE:* And that's a fair question. I'm sorry.  
12 It's Mike Rowe again. The answer is, we don't know. We think  
13 it is very likely that --

14 *THE COURT:* Well, I need to pause then and ask Exxon  
15 what else is there responsive to this question that you haven't  
16 already produced?

17 *MR. BUTHOD:* Judge, this is Ty Buthod for Exxon.  
18 Here's the box we're in. We have given the information on the  
19 demand. We've given the information on the settlements. And  
20 you'll note before, counsel for the government indicated -- he  
21 sort of skipped over ten years of this litigation in the NACC,  
22 in the NACC case. And the problem becomes we did not settle  
23 the NACC case in such a way that said A, B, C insurer is paying  
24 30 percent of this claim because they believe Baytown, but they  
25 don't believe whatever, Beaumont, or they believe Baton Rouge,

1 but they're not going to give any credit for anything in New  
2 Jersey or what have you.

3 *THE COURT:* Or this is a gas station and not either  
4 refinery?

5 *MR. BUTHOD:* Correct. This is like any settlement.  
6 It was -- you know, it's a little messy, but that's how the  
7 sausage is made, Judge. There is a settlement. We've provided  
8 the data for the settlement of --

9 *THE COURT:* And was it a global settlement so that all  
10 contributed to a pot?

11 *MR. STEINWAY:* Yes, Your Honor. Dan Steinway for  
12 Exxon. Yes, Your Honor, it was a global settlement.

13 *THE COURT:* So the insurers simply chipped in. And  
14 did they chip in some kind of formula -- according to some kind  
15 of formula?

16 *MR. BUTHOD:* Candidly, Judge -- Ty Buthod again -- we  
17 don't know what motivated and how the individual insurers  
18 necessarily chipped in and what formula they used.

19 *THE COURT:* All right. So bottom line is, they did  
20 all chip into a pot?

21 *MR. BUTHOD:* And they all got released, so --

22 *MR. ROWE:* Yes, Your Honor. This is Mike Rowe. And I  
23 don't think we disagree with that.

24 *THE COURT:* All right. So that's fine.

25 *MR. ROWE:* Okay.

1           *THE COURT:* So we know then we have to back up to the  
2 claims that were asserted.

3           *MR. ROWE:* Yes, ma'am.

4           *THE COURT:* And we know that -- and nobody -- and this  
5 is not, I think, a rough approximation. This is more precise.  
6 We know that of the total asserted, that approximately -- let's  
7 see, where were we. Of the claims, 7 percent of those claims  
8 related to the two refineries?

9           *MR. BUTHOD:* Yes, Judge.

10          *MR. ROWE:* Right. And, Your Honor, our point is that  
11 it is not necessarily the case that the rest of this is  
12 unknowable. Exxon --

13          *THE COURT:* Well, that's the question. That's the  
14 question. So what is the rest of this? So the major part of  
15 the rest of this is what has to do with what other stuff or  
16 stuff that is so dissimilar that we know it's got to be other  
17 stuff.

18          *MR. ROWE:* Right. So there is a repository of  
19 documentation from that insurance case. It is undoubtedly the  
20 case that there were settlement discussions back and forth. It  
21 is likely the case that people did some math in the course of  
22 those settlement discussions and had views about whether the  
23 gas station claims were good and whether the refinery claims  
24 were good and whether there were statute limitations problems  
25 and all the rest. Now, you know, at some point we're not going

1 to be able to be precise about this. Our complaint really is  
2 that Exxon has been unwilling to look. So, I don't know how  
3 they can say they don't know. I mean, they literally don't  
4 know, but they haven't gone and looked. And if they don't go  
5 and look --

6 *THE COURT:* All right. Here's the approach I want to  
7 take --

8 *MR. ROWE:* Okay.

9 *THE COURT:* -- I want to do a very limited but  
10 representative sampling and make Exxon look at a slice of the  
11 data in this depository. And we can limit it by six months or  
12 three months. We can limit it to a period when we knew that  
13 the -- when settlement discussions of the sort you are  
14 imagining must have occurred. And I see no reason that you are  
15 fanciful here. I see no reason to believe that.

16 *MR. ROWE:* I'm sorry.

17 *THE COURT:* And order Exxon to do an examination of  
18 documents or communications that might shed light on a formula  
19 used to identify claims that were for these refineries as  
20 opposed to other types of properties or other properties, other  
21 kinds -- other costs not in the -- not attributable to the  
22 refinery remediation requirements. Limit it to a very specific  
23 period of time. Would that give us the information we need to  
24 find out if there's any there there?

25 *MR. ROWE:* Your Honor, this is Mike Rowe on the



1 government's side, and I think that would generally be fine  
2 with us. It is much easier for somebody who's looking at these  
3 documents to identify the ones that are meaningful than for us  
4 to speculate about it here. And I think we would suggest  
5 probably the last six months to a year before this settlement  
6 was actually arrived at is when this -- you know, or if they  
7 know of a period when the settlement -- you know, if it's  
8 really from a year and a half to six months and they just  
9 didn't close the settlement. You want the final settlement  
10 discussion is what you're really looking for.

11 *THE COURT:* I got it. So the last six months before  
12 the settlement concluded or the settlement agreement was  
13 reached, at least in principle.

14 *MR. BUTHOD:* Judge, Ty Buthod for Exxon.

15 *THE COURT:* How hard is that for Exxon, Mr. Buthod?

16 *MR. BUTHOD:* Yes. I was going to say, I understand  
17 exactly what the Court's instructing. And you can, I suspect,  
18 appreciate that no one on this call was involved in the NACC  
19 litigation. So we understand what the instruction is. And I  
20 can simply represent that we'll go back and identify --  
21 identify if that's going to be a problem, and certainly the  
22 parties and the Court will hear back from us. But I understand  
23 what the instruction is, and we'll do our very best to comply.

24 *THE COURT:* I think that within 14 days you ought to  
25 have a protocol in place, a discovery plan to conduct precisely

1 this kind of sample. You ought to -- if you are going to  
2 assert that is overly burdensome even to do this, I'm going to  
3 need some precise support on what those burdens are.

4 *MR. BUTHOD:* Understood.

5 *THE COURT:* If you suggest that there is no reasonable  
6 benefit to expect, that is, this is simply -- you know enough  
7 to know that there's no there there, even if the work is  
8 doable, that there wouldn't be anything to find that would  
9 correspond to what we're looking for, it simply doesn't exist,  
10 if you know that now, you can assert that in an objection -- in  
11 an objection, but I would need some affidavit or declaration or  
12 testimonial proof as to why you can reach that conclusion  
13 without even looking at the information to see what it  
14 contains.

15 *MR. BUTHOD:* Judge, I fully understand what the  
16 Court's instruction is on this.

17 *THE COURT:* All right. Good.

18 *MR. BUTHOD:* As a mere placeholder, let me do say,  
19 that we do believe at the end of the day that because what  
20 CERCLA prohibits is double recovery, we don't believe what the  
21 legal position the government is taking, that their first  
22 dollar of an insurance payment is somehow a settlement credit  
23 to the government. But I'm not trying to hold up this  
24 discovery on that. I just want to make that point so that we  
25 don't all assume that we're all going down the road --

1           *THE COURT:* And I appreciate that. I appreciate that.  
2 But there is a prohibition on double recovery, which is sort of  
3 a check to that balance.

4           *MR. ROWE:* Yes, Your Honor. This is Mike Rowe. And I  
5 think the parties and I think the Court has understood since  
6 May that that is a different of opinion that we'll have to sort  
7 out when it's time to brief. So if I seemed to suggest  
8 otherwise, it was not my intention.

9           *THE COURT:* No, I don't think anybody took it that  
10 way.

11           All right. So we'll have within 14 days a  
12 discovery plan with specific objections if those are to be  
13 asserted. If there's -- if that plan is generated without  
14 objection, then I would like the discovery it calls for to be  
15 concluded 30 days later. So, our first deadline is going to be  
16 August 28 for the generation of the discovery protocol by  
17 Exxon. And then the second deadline is going to be  
18 September 25th to have the discovery completed and the  
19 production made. We will schedule a subsequent status  
20 conference for October -- hold on. I'm looking you up -- for  
21 October 6 at 3:00 o'clock central. We can do it by telephone  
22 again. And that should resolve this discovery dispute. I do  
23 not know if we will need to revise expert reports. Once this  
24 information is received, perhaps you can tell me.

25           *MR. ROWE:* Your Honor, it's Mike Rowe. It's a little

1 hard to predict, but I think if there were revisions, they  
2 would probably only be the costs and accounting reports at that  
3 point and it might not be necessary. It's a little hard to  
4 tell until we see whether there's anything to find out.

5 *THE COURT:* All right. So I don't think that we need  
6 beyond what we have already done. I think what we'll do is  
7 extend the scheduling order by 60 days rather than the 30 to  
8 accommodate the one expert's illness and also to take into  
9 account that we're not going to get a decision in the *Shell*  
10 case that may or may not slightly impact where we are on the  
11 stay and the contract dispute that might affect this case until  
12 later than we expected.

13 *MR. STEINWAY:* Your Honor, it's Dan Steinway for  
14 Exxon. When you say to extend the schedule order by 60 days,  
15 are you talking specifically just about this issue or  
16 across-the-board?

17 *THE COURT:* Across-the-board.

18 *MR. STEINWAY:* Well, and, Your Honor -- it's Mike  
19 Rowe -- just to be clear, I think Mr. Steinway maybe is  
20 worrying more than he intends. You're saying instead of 30  
21 days, 60 days, or are --

22 *THE COURT:* Yes. Yes. Yes.

23 *MR. STEINWAY:* Okay.

24 *THE COURT:* Got it.

25 *MR. STEINWAY:* Total.

1           *MR. ROWE:* Okay. And it is Mike Rowe again, Your  
2 Honor. At the risk of my -- I know we've been at this for a  
3 bit now and so I'm about to make myself more unpopular. We do  
4 have the one issue with the new experts yet to go.

5           *THE COURT:* Yes. No, I appreciate that.

6           *MR. ROWE:* Should we go ahead and dive into that or --

7           *THE COURT:* Absolutely.

8           *MR. ROWE:* Okay. So, as the Court may remember, and  
9 may not remember, way back in 2011, in November, shortly after  
10 the two refinery cases were consolidated for discovery, the  
11 parties agreed to a bifurcation for discovery in which the  
12 liability and allocation issues were to be done in the  
13 discovery in Phase I of the case and cost issues, the  
14 accounting issues and Exxon's ability to prove that it actually  
15 spent the money and their compliance with the national  
16 contingency plan, did they do the things that CERCLA rules  
17 require them to do were to be put off until Phase II.

18           You'll first see an indication of that in -- and  
19 I'm using the docket numbered items from the Baytown case,  
20 which is 10-2386. The first indication I see of that is  
21 November 15th of 2011 in our -- in one of our early scheduling  
22 orders. It is also noted in the Court's opinion, which is  
23 No. 161, and the Court tells us early in the opinion, I'm  
24 citing to Exxon's summary judgment motion, which is No. 102,  
25 that that is the bifurcation for discovery.

1           The parties completed their Phase I discovery,  
2 according to the last scheduling order, in June of 2013. And  
3 thereafter while experts could update their reports, we were  
4 done with our discovery for liability and allocation.

5           We then -- and I think it's either that fall for  
6 the following fall -- let's see, we filed summary -- partial  
7 summary judgment motions, which for the government included a  
8 number of liability issues, but not allocation. Exxon had a  
9 number of liability issues and at least some allocation issues,  
10 which the Court ultimately declined to decide. And if you look  
11 back at your opinion, you will see a number of places where you  
12 indicate that we will decide the allocation issues in Phase II.

13           We did not understand that to mean -- I don't  
14 believe either party understood that to mean that we were  
15 reopening Phase I to discovery. So we then in November 2015  
16 came up with a scheduling order for the new case. And in that  
17 order we reported that the Court would be deciding the  
18 allocation issues. But if you look at the first two pages of  
19 that order -- which I'll get you a number for here, hang on. I  
20 have to find the right one. Bear with me just a moment. That  
21 is No. 111. And it describes that allocation is one of the  
22 issues along with costs and NCP, but it then said -- it then  
23 says, The scope of written fact and expert witness discovery  
24 for Phase II is limited to Items B through E -- allocation is  
25 the A item -- because the parties agreed at the time that we

1 had completed our Phase I discovery. So now we're on to Phase  
2 II.

3 *MR. BUTHOD:* Hey, Mike I'm sorry to interrupt you.  
4 This is Ty Buthod. When you're reading from that, would mind  
5 reading the full sentence, where it says "the scope of  
6 written," et cetera, et cetera?

7 *MR. ROWE:* I don't mind.

8 *MR. BUTHOD:* I appreciate it.

9 *MR. ROWE:* But I'm not sure I didn't read it, but  
10 sure. Let me get back to it.

11 *MR. BUTHOD:* I'll just put it simply. It says, "The  
12 scope of written fact witness and expert witness discovery for  
13 Phase II is limited to Items B through E, except as otherwise  
14 noted below."

15 *MR. ROWE:* Yes. So --

16 *MR. BUTHOD:* Thank you.

17 *MR. ROWE:* Okay. Well, and I assume there's something  
18 below that somebody is now going to refer to. I am absolutely  
19 persuaded that there was a clear understanding between the  
20 parties that we were done with Phase I discovery. Both --

21 *THE COURT:* Well, I think that doesn't answer the  
22 question though. It raises the question.

23 *MR. ROWE:* Okay.

24 *THE COURT:* Because both of these orders -- and I'm  
25 looking at --

1           *(Judge speaking to law clerk.)*

2           *THE COURT:* I'm looking at the scheduling and docket  
3 control order that deals with No. 1. It says it is liability  
4 and allocation. And Phase II is costs, NCP issues. And then  
5 if you look at the subsequent scheduling and docket control  
6 order that defines Phase II issues, it's got a long list, and  
7 it starts with the allocation --

8           *MR. ROWE:* Yes, ma'am, but --

9           *THE COURT:* -- of past and future costs among the  
10 responsible parties under 9613(f). So, I think the question  
11 is, under what you have outlined, what does it mean to reopen  
12 allocation when both phases to some extent cover allocation?

13           *MR. ROWE:* Well, okay. So the first point, Your  
14 Honor -- I'm sorry. It's Mike Rowe again. The first point is  
15 if you turn the page below that long list of A, B, C, D, E  
16 items, you will see the language Mr. Buthod and I were just  
17 talking about.

18           *THE COURT:* Yes, sir, I do see it.

19           *MR. ROWE:* And that's the B to E limitation, which I  
20 believe the parties mutually intended --

21           *THE COURT:* And I understand that, but there's still  
22 allocation aspects --

23           *MR. ROWE:* Yes, ma'am. So then --

24           *THE COURT:* -- included. And that's what I'm trying  
25 to grapple with.



1           *MR. ROWE:* So the answer to your question is that when  
2 the parties talk about costs and NCP compliance --

3           *THE COURT:* Right.

4           *MR. ROWE:* -- NCP compliance is an element of Exxon's  
5 case. If they did not comply with the NCP, they will not get  
6 paid.

7           *THE COURT:* Right.

8           *MR. ROWE:* But the cost items was always understood to  
9 be simply did they have invoices and proof of payment and  
10 accounting records that demonstrated that the 30 -- the  
11 50 million at Baytown or what -- I can't remember the numbers  
12 anymore, that they had actually invested those costs on the  
13 clean-up. So, I would have expected going into Phase II, that  
14 each side would have two experts, an NCP expert, which we  
15 talked about in May and accounting people. And we might have  
16 had to have more than one accounting person. But the  
17 allocation, the equitable allocation issues are all about the  
18 issue of World War II and all those things that we talked about  
19 back in Phase I. So, perhaps it will help if I then proceed to  
20 tell you, that Exxon has now added -- or they just served two  
21 additional expert reports --

22           *THE COURT:* Right.

23           *MR. ROWE:* -- both of which had long segments about  
24 the history of World War II and how the government took control  
25 of the refineries. If you read them straight up, they not only

1 sound like allocation issues, much of what's in those reports  
2 sounds intended to persuade the Court about a liability issue  
3 that the Court has now already decided, but there's always some  
4 overlap with allocation, so I don't want to press that point  
5 too far. And then new technical issues, where they quarrel  
6 with the government's chemical engineer about how various  
7 blending imports that were -- that we believe we can show the  
8 Court now were, in fact, imported to the refinery during the  
9 war, something we differ with Exxon about, were actually  
10 applied at the refineries. So, I think they are now beginning  
11 to recognize that the imports happened, and now they want to  
12 have a new expert that will say they don't matter.

13           And they have a second new expert who wants  
14 to create new quarrels, again, with my chemical engineer  
15 Dr. Kittrell, about the importance or lack of importance of  
16 wastes from particular facilities that were in use during the  
17 war, that he had things to say about. So it's a question of,  
18 you know, how much waste came out of the fluid catalytic  
19 cracker and that sort of thing and how important was that  
20 relative to the waste that came out of some other part of the  
21 refinery.

22           *MR. STEINWAY:* Your Honor --

23           *MR. ROWE:* Those were all extensively covered by  
24 multiple engineers on both sides in Phase I, and now here we  
25 are essentially looking for a do-over. That's our gripe.

1           *MR. STEINWAY:* Your Honor, Dan Steinway for Exxon.  
2 May I respond?

3           *THE COURT:* Of course.

4           *MR. STEINWAY:* Your Honor, I would just like to make  
5 two points and I'm sure my fellow counsel will make others as  
6 well. In your summary judgment order that you issued on Phase  
7 I, Your Honor, I would just like to quote -- I apologize for  
8 quoting from in your opinion -- "The United States argues that  
9 the Court should defer deciding equitable allocation, including  
10 methodology, until it receives more evidence during Phase II of  
11 this case, including the opinion of the United States' expert  
12 on CERCLA allocation, Matt Low. The Court agrees with the  
13 United States that deciding on the method for allocating fault  
14 is premature. The Court will resolve that issue during Phase  
15 II of the litigation."

16           *THE COURT:* May I interrupt for one second and ask --

17           *MR. STEINWAY:* Yes, Your Honor.

18           *THE COURT:* -- you to also address that the impact of  
19 the inclusion in this Phase II -- and I'm looking at Docket  
20 Entry No. 111 in the 11 case, which is 168 in the 10 case.  
21 That we specifically provided -- that nothing in the order  
22 would preclude further deposing any experts, serving a  
23 supplemental report, regardless of the issues that that report  
24 covers.

25           *MR. STEINWAY:* Yes, Your Honor.

1           *THE COURT:* Given the deferral or the recognition that  
2 we couldn't address all aspects of allocation raised in Phase I  
3 in Phase I, that there would be parts that you would have to  
4 defer deciding to Phase II, that method did not equate to all  
5 issues, number one; and the fact that the supplemental reports  
6 can be followed by depositions of these experts as to the  
7 supplemental information raised in the reports and that will  
8 provide a shield against any unfairness.

9           *MR. BUTHOD:* Correct, Judge. Ty Buthod for Exxon.

10           *THE COURT:* Now, it may complicate matters more. It  
11 may add to the mix of information that has to be assimilated  
12 and absorbed and accounted for and then decided by the Court,  
13 but I'm not sure that we can avoid that. We can minimize it,  
14 but I don't think we can avoid it.

15           *MR. ROWE:* Your Honor, it's Mike Rowe. Might I be  
16 heard on that point?

17           *THE COURT:* Yes, sir.

18           *MR. ROWE:* I sincerely believe, and I believe there  
19 was a meeting of the minds of the parties, the reason that  
20 language is in this report, and I believe we may have -- or in  
21 this schedule, and I believe we've had it in a number of prior  
22 schedules, is that rule -- I think it's Rule 26(e)(2), you  
23 probably know better than I, says that an expert is not only  
24 permitted but obligated to update his or her work --

25           *THE COURT:* Okay.

1           *MR. ROWE:* -- to the final pretrial. We decided  
2 amongst ourselves that we would set a date somewhat earlier  
3 than that, because this is a very complex case. That will now  
4 be early December, with the 60-day extension. And we have  
5 also -- Exxon also served a supplemental report of A.J. Gravel,  
6 their historian, and we are not protesting about that even  
7 though --

8           *THE COURT:* No, I understand. But you didn't simply  
9 say you can take a deposition of any supplemental -- to cover  
10 any supplemental report. You said "regardless of the issues  
11 that report addresses," which means it didn't matter if it was  
12 a Phase I issue or a Phase II issue.

13           *MR. ROWE:* Yes. No, you're quite right, and that was  
14 meant to allow Phase I experts to continue to supplement their  
15 work. It was not meant to allow entire new experts with entire  
16 new sets of opinions, so --

17           *THE COURT:* And how much of this is supplementation  
18 and how much of this is brand-new to the table?

19           *MR. ROWE:* Well, there are two new engineering experts  
20 in addition to the two, I believe, that Exxon already had. And  
21 they are offering -- on the history material, which they're not  
22 qualified to testify about anyway, frankly, they're not much  
23 different from what Mr. Gravel said. So, it's cumulative, but  
24 it's not particularly --

25           *THE COURT:* Harmful.

1           *MR. ROWE:* -- important or enlightening, I don't  
2 think. But on the technical issues, these are new attempts --

3           *THE COURT:* Are they new people on the technical  
4 issues?

5           *MR. ROWE:* Yes, both are new experts.

6           *THE COURT:* All right. Keep going.

7           *MR. STEINWAY:* Your Honor, this is Dan --

8           *THE COURT:* Well, wait, wait. I don't think Mr. Rowe  
9 had finished.

10           *MR. ROWE:* I'm close, Your Honor. The point is that  
11 Exxon in some respects may not believe it won the day or will  
12 win the day, for example, on an argument that blending agents  
13 were, in fact, not imported and used at the refinery during the  
14 war. They had opportunities during Phase I, if they had wanted  
15 to, to have engineers say, Well, even if they were imported, it  
16 doesn't matter for some reason. And they are now attempting to  
17 insert those experts as, I guess, supplementary or whatever  
18 they want to call it, in Phase II. Those are not the rules  
19 we've been playing by.

20                       So the government now has to go out and have its  
21 expert spend more time rebutting new expert reports. And, of  
22 course, we have not had the opportunity then to go back and see  
23 if there are any particular weaknesses in our case where we  
24 would like to toss in a new expert. So the problem for us is,  
25 it does not seem equitable and it's not what we agreed. It's

1 not that we couldn't do it this way, we just didn't.

2           *MR. BUTHOD:* May I address that, Judge? Ty Buthod for  
3 Exxon.

4           *THE COURT:* You may.

5           *MR. BUTHOD:* Judge, I think the best evidence of what  
6 the parties agreed is Document 111, the scheduling order, and  
7 it gives two different expert deadlines. You'll see in 5a,  
8 proponent to designate any expert witness on any Phase II issue  
9 in writing. That was not staggered, so the plaintiffs do it on  
10 one day and the defendants do it on another day. We agreed to  
11 that. We know that any Phase II issue captures allocation, and  
12 the reasons you already talked about. Then in 5f, there's  
13 another deadline later for supplemental expert reports like  
14 we've already talked about.

15           I guess it's kind of an unusual circumstance,  
16 more than a year out before the trial date, but I understand  
17 the government to be asking that these witnesses be struck.  
18 And, I mean, I guess counsel's letter said he wants the  
19 opportunity to file a brief on this, which we can't oppose him  
20 filing a brief, but we know there are standards in the Fifth  
21 Circuit about striking an expert.

22           *THE COURT:* No, I'm not going to strike the expert.

23           *MR. BUTHOD:* Yeah, I mean --

24           *THE COURT:* So the question is should we limit them  
25 to -- in some fashion that would address the government's

1 concerns? And I think the government is really saying, Nothing  
2 they're saying is appropriate, because it all takes us back to  
3 Phase I in an inappropriate way.

4 *MR. BUTHOD:* Then I would suggest --

5 *MR. STEINWAY:* Your Honor, Dan --

6 *THE COURT:* Excuse me. Go ahead, Mr. Rowe.

7 *MR. BUTHOD:* It's actually me and Mr. Steinway. We're  
8 talking over each other. Sorry, Judge.

9 *MR. ROWE:* I was not in that. Sorry, Judge.

10 *MR. BUTHOD:* I apologize.

11 *THE COURT:* Somebody.

12 *MR. STEINWAY:* Your Honor, it's Dan Steinway. The  
13 government mischaracterizes the nature of both of these  
14 experts' reports. These reports are not at all intended to  
15 address the liability issues. The Court has already ruled on  
16 those questions in Phase I. These reports clearly -- and the  
17 government has carefully excerpted out in their  
18 characterization of these reports minimal portions of these  
19 reports. These reports go to substantiate the allocation  
20 methodology that our allocation expert has used. They are not  
21 intended at all to address liability considerations. They are  
22 intended to address the very issues that the Court has said  
23 need to be addressed in Phase II, equitable allocation.  
24 They're intended to address questions of how the allocation  
25 methodology should be adopted, the assumptions that go in the



1 methodology, the technical assumptions of the methodology, and  
2 not at all intended to address the kinds of questions that the  
3 government has suggested that they were intended to address.

4 *THE COURT:* All right. I'm going to hear once more  
5 from the government on this, and then I'm prepared to rule.  
6 Government.

7 *MR. ROWE:* Your Honor, it's Mike Rowe. Let's start  
8 with the language. I take Mr. Buthod's point. But if you read  
9 5a and the various other places the way he does, it writes the  
10 initial part of the statement of what we're going to do in  
11 Phase II completely out of the schedule, which I can't believe  
12 anybody would believe we intended.

13 I do believe the issues are new. I do believe  
14 they're Phase I issues. If the Court is going to allow them,  
15 then, you know -- and I don't think it is going to be  
16 productive to try to allow these witnesses to testify and then  
17 try to restrict what they can talk about.

18 *THE COURT:* I agree with that. I agree with that.

19 *MR. ROWE:* I hear your willingness to think about  
20 that. I just don't think it's very --

21 *THE COURT:* No, I think the line drawing would be  
22 extraordinarily difficult, not to mention time-consuming.

23 *MR. ROWE:* And I will -- I hesitate to tell you this,  
24 because it may not be great for how it's going to turn out for  
25 the government, but I have spoken to our expert. I believe we

1 can meet the new testimony in these reports. The problem for  
2 us is -- I mean, I guess the problem for us is that we had this  
3 agreement and we think it's being violated, that Exxon tends to  
4 want to go quickly in Phase II, and we keep hearing that Phase  
5 II is a simple thing with just costs and allocation. And now  
6 here we are circling all the way back to something that was  
7 supposed to be over in June of 2013, and the government is  
8 having to spend time and effort and money to do this. And I  
9 guess -- I can't tell you at this point that I know of a topic  
10 on which I would like to submit an expert report -- another  
11 expert report for the government from Phase I, but I can't tell  
12 you that I wouldn't have done it if the option were available.

13           So for us it's really a matter of fairness, of  
14 both sides playing by the same rule. And if you choose to  
15 allow these things, you know, we -- we're a big government, we  
16 will deal with it, but we don't think it's appropriate and we  
17 don't think it's what we agreed to.

18           *THE COURT:* All right. I think that there's no way to  
19 trim it once it's allowed, and I really don't see either a  
20 terrible cost to allowing it or a principled way to avoid it  
21 entirely, given the way we have structured the relationship of  
22 the two phases, given the opportunities that the order properly  
23 provides for flexibility in implementation. I think that we  
24 are in the position that we're in because it's unavoidable. So  
25 my inclination is to allow the reports and allow additional

1 depositions and the designation of responsive -- or the  
2 production of responsive reports, including, but not limited  
3 to, by newly designated experts, in order to prevent any  
4 prejudice.

5           *MR. ROWE:* Very well, Your Honor. Did you -- that's  
6 fine. And I understand the Court's position, just as  
7 Mr. Buthod understood the instructions before. We will assume  
8 those two experts will proceed normally with their reports. We  
9 will, of course, want to depose them along with the others when  
10 we get into that segment. And we will serve a responsive  
11 expert report. I believe that we probably can serve that  
12 report by the existing deadline, if you would like to have us  
13 do that. I'm quite sure we could use a little more time if  
14 that's available.

15           *THE COURT:* Well, remember, you're going to have some  
16 extension anyway.

17           *MR. ROWE:* Well, if we're going to move the expert  
18 deadline -- in other words, the 30 days becomes 60 days, then  
19 I'm sure we can -- so if everybody is going to move all their  
20 expert reports from the 22nd of August to the 22nd of  
21 September --

22           *THE COURT:* Right.

23           *MR. ROWE:* -- we're fine. We'll do it.

24           *THE COURT:* Okay. That sounds great. Then, now, the  
25 ones that have already been produced or designated, we don't

1 need -- we can add 60 days from that date. How long ago were  
2 they provided?

3 *MR. ROWE:* You lost me, Your Honor. I'm sorry. It's  
4 Mike Rowe.

5 *THE COURT:* Have the experts been designated already,  
6 and how long ago?

7 *MR. ROWE:* Oh, no. They would be designated today  
8 and --

9 *THE COURT:* Okay.

10 *MR. ROWE:* -- we could apply the same 30 days, if you  
11 like, and we would be fine.

12 *THE COURT:* All right. So it will be 30 days added to  
13 today --

14 *MR. ROWE:* Well, again, just to simplify this, and  
15 we're going to send you a new schedule to make it clear, but it  
16 would be 60 days from July 22nd, so August --

17 *THE COURT:* All right. Even better. Even better.  
18 All right. Well, use your presumption -- your trigger --

19 *MR. ROWE:* Okay.

20 *THE COURT:* -- we'll add the 60 days. That should  
21 obviate the need for any additional extension of these or  
22 related deadlines.

23 *MR. ROWE:* With the exception of the possible Rocky  
24 Mountain spotted fever patient, I certainly agree, Your Honor.  
25 And we're hopeful. His fever seems to have broken in the last

1 day or two. So if it stays broken this time, I think --

2 *THE COURT:* Then I think we will have accommodated his  
3 needs as well.

4 *MR. ROWE:* Yeah.

5 *THE COURT:* Good. Okay. Guys, what else?

6 *MR. ROWE:* Oh, my goodness, I think we have perhaps  
7 come to the end, Your Honor.

8 *THE COURT:* Well, I think that given our history, it  
9 is not ajouré. It is au revoir. Right?

10 *MR. BUTHOD:* Thank you, Judge.

11 *THE COURT:* And we have another hearing set,  
12 particularly in the event one is needed, but even if it is not,  
13 I think we should have a discovery, touch base status hearing  
14 on the date even if there is a clear answer from the sampling  
15 that has been ordered. I suspect that we will need to address  
16 some issues and we should keep the date and have the hearing on  
17 that date in order to ensure that the case keeps moving.

18 *MR. BUTHOD:* Understood. Thank you, Judge.

19 *THE COURT:* I really want to keep this expanded  
20 schedule, because every time we touch it, we expand it further.

21 *MR. ROWE:* We will do the best we can, Your Honor, and  
22 I think there's a -- I think we're getting to the point where  
23 we will be fine with this --

24 *THE COURT:* And I appreciate that. Let me just raise  
25 one more question. And it is not urging you. I'm not twisting

1 anybody's arm one way or t'other. But my question is this: At  
2 some point -- and I know that you've tried to resolve this in  
3 the past, and I appreciate your efforts. Without in any way  
4 suggesting that it is important for you to keep trying --  
5 important to me, that is, it is not. I'm happy to try the  
6 case. But as you get this additional information and a clearer  
7 picture of precisely how much is at stake here in relationship  
8 to the collateral sources, recognizing there are disputed legal  
9 issues about the effect of prior payments, it may be that it  
10 makes sense to reexamine opportunities for resolution. I only  
11 raise it. I'm not setting deadlines, imposed any requirement.  
12 I just want to be sure that we have not taken it off the table  
13 as your understanding of the case continues to refine, no pun  
14 intended, continues to be refined and to evolve.

15 *MR. ROWE:* Your Honor, Mike Rowe. From the  
16 government's side, we certainly have not written the  
17 possibility off. I think the parties both recognize that we're  
18 not in a period where we're talking about it right now.

19 *THE COURT:* Right, and that's fine. You need to focus  
20 elsewhere. Right now you're focused on getting additional  
21 information.

22 *MR. ROWE:* Right. And we're waiting for Judge Braden  
23 and we're waiting for a number of other things --

24 *THE COURT:* Well, I don't think that Judge Braden is  
25 going to give us a lot of guidance in the next six months,

1 because of the relationship of the two proceedings. All she's  
2 going to decide is whether she ought to go ahead and decide,  
3 that is, lift the stay.

4 *MR. ROWE:* Oh, yes, I think -- I'm sorry, Your Honor.  
5 I think that the decision that people are waiting for is  
6 actually in a related case called *Shell* --

7 *THE COURT:* No, I understand, but she's going to then  
8 use that decision --

9 *MR. ROWE:* Yes. No, that is our understanding.

10 *THE COURT:* -- to decide whether to precede in this  
11 contract dispute or to keep the stay in place.

12 *MR. ROWE:* Yes, ma'am. But to your broader point, I  
13 think we all would like -- we would all rather settle the case  
14 than try it, if we can find a way to do it. I haven't talked  
15 to Mr. Steinway lately, but he often tells me that he would  
16 like to settle it, so I'll let him tell you, but I'm pretty  
17 sure we'd both like to do it if we thought we could get there.

18 *MR. STEINWAY:* Your Honor, it's Dan Steinway for  
19 Exxon. And we agree with the United States.

20 *THE COURT:* All right. Well, let's then schedule  
21 among the topics to be addressed at our next telephone  
22 conference whether it is appropriate at that time, given the  
23 additional information you have learned, which I believe will  
24 include additional expert reports, as well as information on  
25 whether there is information and what it is that would help

1 with more precise allocation of insurance payments previously  
2 made, whether it is at that point useful to schedule a formal  
3 reassumption of mediation.

4 *MR. ROWE:* Very good, Your Honor.

5 *THE COURT:* Does that work?

6 *MR. STEINWAY:* Yes, Your Honor.

7 *THE COURT:* Okay. I think we all have our  
8 assignments. And the immediate thing I will look for is the  
9 amended scheduling order that the two of you -- the two sides  
10 will exchange, approve, and submit. Correct?

11 *MR. BUTHOD:* Thank you, Judge.

12 *MR. ROWE:* Very good. Thank you, Judge.

13 *THE COURT:* And I would like you, Exxon, as well,  
14 although ordinarily we don't file discovery requests with the  
15 court, that I would like you to file the proposed protocol for  
16 searching the information -- searching for the information on  
17 the sampling basis I've ordered. When you produce it to the  
18 other side, send it to the other side, please file it with the  
19 court as well.

20 *MR. STEINWAY:* We'll do, Your Honor.

21 *THE COURT:* Thank you so much. All right. I look  
22 forward to the next filings and to continuing to move this  
23 case. It continues to be a terrifically interesting case, and  
24 I appreciate the parties' patience in presenting it to the  
25 Court.



25